

Exhibit IND24

1 IN THE UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA
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4

5 NEUROGRAFIX, a California)
6 corporation; WASHINGTON RESEARCH)
7 FOUNDATION, a not-for-profit)
8 Washington corporation,)

9 PLAINTIFFS,) CASE NO.

10 VS.) CV 10-1990 (MRP) (RZX)

11 SIEMENS MEDICAL SOLUTIONS USA,)
12 INC., a Delaware corporation and)
13 SIEMENS AKTIENGESELLSCHAFT, a)
14 German corporation,)

15 DEFENDANTS.)

16 _____)
17 AND RELATED CROSS ACTION)
18 _____)

19
20 VIDEOTAPED DEPOSITION OF AARON G. FILLER, M.D.

21 LOS ANGELES, CALIFORNIA

22 FEBRUARY 22, 2011
23

24 REPORTED BY: CHRISTY A. CANNARIATO, CSR #7954, RPR, CRR

25 JOB NO.: 36551

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February 22, 2011

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9:03 a.m.

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Deposition of Aaron G. Filler, M.D., taken on

14

behalf of Defendants, held at the offices of

15

Russ, August & Kabat, 12424 Wilshire Boulevard,

16

Suite 1200, Los Angeles, California, before

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Christy A. Cannariato, CSR #7954, RPR, CRR.

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A P P E A R A N C E S

REPRESENTING THE PLAINTIFF AND THE WITNESS:

RUSS, AUGUST & KABAT

BY: MARC FENSTER, ESQ.

12424 WILSHIRE BOULEVARD

LOS ANGELES, CALIFORNIA 90025

REPRESENTING THE DEFENDANTS:

KIRKLAND & ELLIS

BY: GREGG LoCASCIO, ESQ.

BY: SEAN M. McELDOWNEY, ESQ.

655 FIFTEENTH STREET, N.W.

WASHINGTON, D.C. 20005

ALSO PRESENT:

MICHAEL MOSELEY, Ph.D.

DARREN SIRKIN, THE VIDEOGRAPHER

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QUESTIONS INSTRUCTED NOT TO ANSWER

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1 Los Angeles, California; Tuesday, February 22, 2011

2 9:03 a.m.

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5 THE VIDEOGRAPHER: Good morning.

6 This is the start of tape labeled No. 1 of the
7 videotaped deposition of Aaron Filler in the matter
8 Neurografix versus Siemens in the US District Court,
9 Central District of California, Case No. CV 10-19990
10 (MRP) (RZX).

11 This deposition is being held at 12424
12 Wilshire Boulevard, Santa Monica, California, on Tuesday,
13 February 22nd, 2011 at approximately 9:03 a.m.

14 My name is Darren Sirkin from TSG Reporting.
15 The court reporter is Christy Cannariato also in
16 association with TSG.

17 Counsel, would you please introduce
18 yourselves.

19 MR. LoCASCIO: Gregg LoCascio and Sean
20 McEldowney from Kirkland & Ellis, LLP on behalf of the
21 Defendants. In attendance is Dr. Michael Moseley.

22 MR. FENSTER: Marc Fenster with Russ, August &
23 Kabat on behalf of Neurografix and the witness.

24 THE VIDEOGRAPHER: Thank you. Will the court
25 reporter please swear in the witness.

1 AARON G. FILLER, M.D.,
2 having first been duly sworn, was
3 examined and testified as follows:
4

5 EXAMINATION

6 BY MR. LoCASCIO:

7 Q. Good morning, Dr. Filler.

8 A. Good morning.

9 Q. Have you been deposed before?

10 A. Yes.

11 Q. And roughly tell me how many times.

12 A. About 250, 300 times.

13 Q. What context generally were those depositions
14 in?

15 A. They were mostly medical sort of personal
16 injury, med-mal. Some of them are expert, mostly relating
17 to medical imaging in some ways.

18 Q. In any of them were you a named party?

19 A. Yes, I've been a named party a few times.

20 Q. Were you ever the plaintiff or were you always
21 the defendant in those cases?

22 A. Both.

23 Q. Can you just tell me briefly in what context
24 you've been a plaintiff, sir, other than this case?

25 MR. FENSTER: You mean him personally?

1 particular calculation.

2 Q. Okay. It sounds like two or three times
3 you've said that ratio of differences, that way to measure
4 conspicuity, is specifically you specifically in the
5 specification tell people is not the way to do it.

6 Have I heard you correctly?

7 A. Yeah. Because we say that --

8 Q. Can you just tell me where you're reading
9 from?

10 A. We're on Column 27, line 57.

11 Q. Thank you. Go ahead.

12 A. So we're talking about the unique internal
13 organization.

14 Q. And so is it your belief, sir, that when --
15 withdrawn.

16 When you earlier said, We told people
17 specifically in our specification, Do not use the
18 difference method of calculating conspicuity, is Column 27
19 where you believe you conveyed that in the disclosure?

20 A. Yeah. Column 27 we say that even when the
21 conspicuity doesn't permit identification, you can use the
22 second technique. And then we go on to explain that
23 technique. So we take this, the ratio of differences that
24 you described, using your term.

25 But we specifically say thresholding, use of

1 thresholding processes -- this is Column 28, line 2:

2 (Reading:) Thresholding process is used to
3 identify relatively bright regions of the image
4 potentially representative of nerve. Within the
5 boundaries of these regions established the
6 intensity of the pixels associated with each
7 region is evaluated. An average of intensities
8 -- image intensities for the regions are
9 computed. And we then I can read through it but
10 it goes through and explains how we look at the
11 difference of intensities.

12 Q. Okay. The portion you read a second ago,
13 which ended at I think line 7 of column 28, that had not
14 yet talked about the difference method that we've been
15 talking about; right? That's not -- you haven't read
16 anything talking about the difference, the ratio of the
17 differences as of line 7 in column 28. True?

18 A. Right.

19 Q. Okay. Do you believe starting at line 8, the
20 patent now explains not to use the ratio of differences to
21 calculate conspicuity?

22 A. (Document review.) Well, this is essentially
23 a method of doing the fascicle identification. And what
24 it's doing is using a threshold to get you this difference
25 between bright and dark. So I'm not sure that it exactly

1 maps to the simple equation, but my recollection is that
2 this is -- this and other text in the specification leads
3 one to a method for the -- that looks at this bright to
4 dark -- and also I think we use it in the -- I guess they
5 refer to it in the infringement contentions where I lay it
6 out in more -- where it's laid out in more detail for the
7 subtraction. And here what we try to do is we're taking
8 pixel -- adjacent pixel groups and looking for these
9 differences in intensity.

10 Q. Sir, the section we just looked at that you
11 were reading starting at line 8 of Column 28 doesn't
12 describe in the text a conspicuity formula that is akin to
13 the paragraph 24 of the Moseley report which is maximum
14 signal intensity minus min divided by maximum background
15 intensity minus min; right?

16 MR. FENSTER: Objection. Vague.

17 A. I mean, I think this is -- my impression is
18 that this fascicle identification method is the closest
19 thing to what one might be trying to achieve a min or max.
20 But the fundamental problem is that's not something that
21 is widely used and is not what we, you know, describe.
22 And we allude to it as trying to use a -- because what you
23 use that for is a complexity measure, essentially. What
24 we're talking about you can use a complexity measure or
25 fascicle identification algorithm, but we're not going to

1 call that conspicuity. And you could call that
2 conspicuity, but we're not calling that conspicuity.

3 Q. And you believe this language in the patent
4 tells the reader that that is not -- do not use that way
5 in calculating conspicuity.

6 A. Right. We're talking -- saying the complexity
7 measure is going to be different from the straight ratio
8 of intensity measure.

9 MR. FENSTER: When you get to a convenient
10 stop --

11 A. Ratio average intensity.

12 MR. FENSTER: -- stopping place. What's your
13 plan for lunch? It's 12:15.

14 (Exhibit 16 marked for identification.)

15 MR. LoCASCIO: Let's go like another 10
16 minutes, then we'll take a break and talk about it mark.

17 Hand you Exhibit 16, sir, which is
18 Neurografix's disclosure of its claims and infringement
19 charts. And I would like for you, first of all, have you
20 ever seen that before?

21 A. I have seen this before.

22 Q. And Exhibit 16 I would like to were you --
23 withdrawn.

24 Were you involved in the preparation of this
25 document?

1 MR. FENSTER: Actually, I will instruct you
2 not to answer on the grounds of attorney-client privilege.

3 Q. Is today the first time you've seen it?

4 You may answer yes or no.

5 A. No, this is not the first time I've seen it.

6 Q. Had you seen it before it was submitted to
7 Siemens, the Defendants?

8 A. I did see it before it was submitted.

9 Q. I want to direct your attention, sir, to page
10 -- at the very bottom of page 4 of the attachment. So
11 there's a chart, sir, created by plaintiffs. And then the
12 very bottom of 4 there's one line of a section that gets
13 cut off.

14 And so starting there, if you look at the left
15 side, that's the claim language. The right side of this
16 is alleged to be where it's found in the accused product.
17 Do you understand that?

18 A. Mm-hmm.

19 MR. FENSTER: Objection to the extent it
20 misstates it.

21 Q. If you read the language on the left,

22 (Reading:) Processing the output to
23 generate a," and then you carry over to the next
24 page, "data set describing the shape and position
25 of said nerve, said data set distinguishing said

1 confusion in this. So we can certainly resubmit the
2 invalidity contentions to clarify that for you.

3 Q. So your position now, sir, now that we've
4 talked about this in your deposition, is that the text on
5 the top of page 7 in that box in Exhibit 16, the first
6 sentence of that does relate to [1](e)[1], as it's
7 described in this chart, the conspicuity of 1.1. The next
8 two sentences that describe the difference method of
9 measuring that ratio do not relate to [1](e)[1] and ought
10 to have been in the [1](e)[2] box?

11 A. I think what happened is --

12 Q. Is that --

13 A. -- this is from the draft invalidity
14 contentions for Oak Tree, and --

15 MR. FENSTER: Let me caution you not to reveal
16 work product and communications with counsel or how these
17 were prepared.

18 Q. So your answer, sir, is that the box that
19 we're looking at for [1](e)[1] in Exhibit 16 in the
20 attached chart from Neurografix, for lack of a better
21 word, is wrong?

22 A. No. I said that it refers to the fascicle
23 identification portion, whereas the first sentence refers
24 to the 1.1 conspicuity. I'm not quite sure if the lines
25 have some legal significance, you know, in the box.

1 MR. FENSTER: I think he's politely saying I
2 screwed up, but I should have put that down in [1](e)[2].

3 Q. Your opinion, sir, is it is part of [1](e)[1]
4 or the conspicuity limitation; that one way to measure
5 that is the use of NIH ImageJ software.

6 A. Yes.

7 Q. And everything after that, which describes as
8 we talked about, what is equation 24 or the equation in
9 paragraph 24, the Moseley report, was included in
10 [1](e)[1] here but should no longer be there?

11 A. It should be. It relates to [1](e)[2], which
12 is analyzing the output for information representing the
13 fascicles. Because if you look at what's opposite that,
14 yeah, it just simply says it has had the verbal analysis.
15 So you have a reading a report from one of the infringing
16 institutions whereas, you know, this analysis gives you a
17 mathematical method of doing the fascicle identification
18 that correlates with the text in the patent where we talk
19 about the fascicle identification as an alternate to
20 conspicuity.

21 So I think, you know, you have to go with what
22 the specification says and for the point of view of
23 infringement. That's -- I would take it to say that the
24 first line is the conspicuity correlated to the text and
25 then the second part is fascicle identification.

1 (Exhibit 17 marked for identification.)

2 Q. I'm hopeful that we -- my goal here is to not
3 spend a lot more time, to just close out conspicuity and
4 then we'll take a lunch.

5 I want to show you Exhibit 17, which are
6 Neurografix's claim constructions from the Oak Tree case.
7 I take it, as with this case, you were an active
8 participant in managing that litigation. Fair?

9 A. Yes.

10 Q. And I take it this is not the first time
11 you've seen the proposed claim constructions in the Oak
12 Tree case asserting the same '360 patent; fair? You had
13 seen that before?

14 A. Yes, I've seen this before.

15 Q. And you reviewed them before they were filed
16 or served; am I correct?

17 A. Yes, I did.

18 Q. Turn to page 6, please. This was
19 Neurografix's proposed construction of conspicuity in the
20 Oak Tree case where the same patent was at issue.
21 "Conspicuity refers to the visual contrast (in terms of,
22 for example, intensity, color, and/or complexity) between
23 the tissue (e.g. nerve) and surrounding background
24 tissue."

25 Did I read that correctly on page 6 of

C E R T I F I C A T E

STATE OF CALIFORNIA)
) SS.:
COUNTY OF LOS ANGELES)

I, CHRISTY A. CANNARIATO, a Certified
Shorthand Reporter within and for the State
of California, do hereby certify:

That Aaron G. Filler, M.D., the witness
whose deposition is hereinbefore set forth,
was duly sworn by me and that such
deposition is a true record of the
testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 23rd day of February, 2011.

CHRISTY A. CANNARIATO, CSR #7954